No. 94-325

Supreme Court, U.S.
FILED
DEC 30 1994
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In The

Supreme Court of the United States

October Term, 1994

CHANDRIS INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

against

ANTONIOS LATSIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act, 46 U.S.C. § 688?

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BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed, with the consent of the parties, on behalf of the United Brotherhood of Carpenters and Joiners of America ("UBCJA"). The UBCJA is an international labor organization with affiliates in the United States and Canada. It enjoys a total membership of more than 567,000 working men and women. Many of those men and women work upon the navigable waters of the United States. They work as deep sea divers, diver tenders, piledrivers, carpenters, riggers, welders, and

marine platform builders. They work on rivers, in harbors, and upon or beneath the high seas. They construct piers, wharves, bridges, oil platforms, submarine pipelines, underwater transit tubes, and open ocean sewer outfalls. They perform those tasks from derrick barges, dredges, tugs and other special purpose construction vessels owned or operated by their employers. Their work "*necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land."[1] This Court has confirmed their maritime status under both the Longshore and Harbor Workers Compensation Act ("LHWCA")[2] and the Jones Act.[3] We respectfully submit that this status gives them an abiding interest in the question for review.

SUMMARY OF ARGUMENT

This case comes to Court in the wake of *McDermott International, Inc. v. Wilander*[4], and *Southwest Marine, Inc. v. Gizoni*[5] and steers us back towards the rocks and shoals of Jones Act coverage. We're standing into ill-charted

[1] *Wallace v. Oceaneering International*, 727 F.2d 427, 436 (5th Cir. 1984) [original emphasis].

[2] *E.g., Director, OWCP v. Perini North River Assoc.*, 459 U.S. 293 (1983) [piledriver held Longshore "employee"].

[3] *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) [piledriver held Jones Act "seaman"].

[4] *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991).

[5] *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486 (1991).

waters. The Jones Act, of course, protects "[a]ny *seaman* who shall suffer personal injury in the course of his employment"[6], but nowhere defines that key term.[7] As a consequence, the statute has drifted on a sea of conflicting interpretations for more than seventy-four years.[8] The *Wilander* decision escorted us past one of those conflicts when it "jettisoned" the aid to navigation requirement, and ruled that seamen need not serve the transportation function of their vessel, provided they contribute to her overall mission by doing "ship's work."[9] What is more, *dictum* from that decision set a course around the present conflict when it confirmed that: "All those who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as

[6] According to the Jones Act:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right to trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply[.]" 46 U.S.C. § 688(a).

[7] Curiously enough, though Congress uses the term "seaman" throughout the Shipping Code, the only statutory definition appears in 46 U.S.C. § 10101(3). According to that definition, "'seaman' means an individual (except scientific personnel, a sailing school instructor, or a sailing school student) engaged or employed *in any capacity* on board a vessel."

[8] As one lower court Jones Act decision noted, quoting Diderot, " 'We have made a labyrinth and got lost in it.'" *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984).

[9] 111 S. Ct. at 817.

decisional, is directed."[10] That *dictum* highlighted the distinction between "land-based and sea-based employment" that underlies the mutual exclusivity of the Jones Act and the LHWCA.[11]

While the workers' compensation remedy set up by the LHWCA was intended for those who toil along the waterfront, on or near the shore, the hearty tort remedy contained in the Jones Act was designed to offset " 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.' "[12] If we are to honor that critical distinction, we should concede that employees who are injured aboard a vessel, during a voyage, while performing ship's work and enduring ship's perils, are then and there Jones Act seamen whether or not they have spent the rest of their careers afloat.

In short, the UBCJA respectfully urges the Court to affirm those Jones Act cases from the Second, Third, Sixth and Ninth Circuits which hold that "a plaintiff's status as a seaman is determined at the time of his injury."[13] Those holdings jibe perfectly with *Wilander's* decision to adopt

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[10] 111 S. Ct. at 817.

[11] *Id.*

[12] *Wilander, supra*, 111 S. Ct. at 817, *quoting Seas Shipping v. Sieracki*, 328 U.S. 83, 104 (1946) [Stone, C.J. dissenting].

[13] *Petersen v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 739 (6th Cir. 1986); *see also, Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.2d 1247, 1251 (3d Cir. 1994); *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (2d Cir. 1975); *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521, 525 (9th Cir. 1989).

that portion of the *Robison*[14] test which requires a crew member to " 'contribut[e] to the function of the vessel or to the accomplishment of its mission. . . . ' "[15] As even jurists from the Fifth Circuit agree, "An assignment to work as a crew member, like the voyage of a vessel, may be brief, and the *Robison* test is applicable in deciding the workers' status during any such employment."[16] It therefore seems difficult to square the original holding in *Robison* with the Fifth Circuit's more recent view that, "The issue of an injured worker's status as a seaman should be addressed with reference to the nature and location of his occupation taken as a whole."[17] Whether or not this notion should be employed offensively, to expand remedial Jones Act coverage and bestow seaman's status upon ambiguous, amphibious maritime workers, it is both harsh and incongruous to apply it defensively to curtail the statute's protection and deny a seafaring plaintiff seaman standing.

The idea that a plaintiff's Jones Act status should be "determined 'in the context of his entire employment' "[18] has impelled the Fourth and Fifth Circuits to banish ship's pilots[19] and deep sea divers[20] from the statute's

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[14] *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

[15] *Wilander, supra*, 111 S. Ct. at 817.

[16] *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067, 1077 (5th Cir. 1986) [Rubin, J., dissenting].

[17] *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 (5th Cir. 1980).

[18] *Barrett, supra*, 781 F.2d at 1075.

[19] *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 328 (5th Cir. 1991) [Brown, J., dissenting] *vacated*, ___ U.S. ___, 114

embrace. Few workers are more intimately or continuously exposed to the perils of the sea than a ship's pilot, and none more so than a deep sea diver.[21] Deep sea divers have thus enjoyed the rights and duties of seamen since at least 1859.[22] Moreover, as this Court specifically

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L.Ed.2d 706 (1991) *reinstated on reconsideration*, 947 F.2d 129 (5th Cir. 1991), *cert. den.*, ___ U.S. ___, 118 L.Ed.2d 592 (1992); *Harwood v. Partredereit AF*, 944 F.2d 1187 (4th Cir. 1991), *cert. den.*, ___ U.S. ___, 117 L.Ed.2d. 493 (1992); *see also, Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207 (3d. Cir. 1993). *Contra see, Ringering v. Compania Maritima De-La-Mancha*, 670 F. Supp. 301 (D. Or. 1987), *affd. mem.*, 848 F.2d 1243 (9th Cir. 1988); *Clark v. Solomon Nav. Co., Ltd.*, 631 F. Supp. 1273 (S.D.N.Y. 1986).

[20] *Ashley v. Epic Divers, Inc.*, 818 F. Supp. 172 (E.D. La. 1991), *aff'd without opinion*, 976 F.2d 730 (5th Cir. 1992).

[21] *Wallace v. Oceaneering International, supra*, 727 F.2d at 436; *Webster v. Seahorse Fleet, Inc.*, 637 F. Supp. 151, (W.D.La. 1986); Robertson, "The Law of Seaman Status Clarified," 23 J. of Mar.L. & Com. 1, 15 (Jan. 1992).

[22] *See, e.g., The Highlander*, 12 Fed.Cas. 136 (D. 1859) [salvage diver held seaman]; *The Murphy Tugs*, 28 F. 429 (E.D. Mich., 1886) [salvage diver held seaman]; *Pickle v. International Oilfield*, 791 F.2d 1237 (5th Cir. 1986) [offshore oil diver held seaman]; *Wallace v. Oceaneering International*, 727 F.2d 427 (5th Cir. 1984) [offshore oil diver held seaman]; *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372 (5th Cir. 1981) [salvage and construction diver held seaman]; *Taylor v. Packer Diving & Salvage Co.*, 342 F. Supp. 365 (D.C.La. 1971), *aff'd*, 457 F.2d 512 (5th Cir. 1972) [offshore oil diver held seaman]; *Webster v. Seahorse Fleet, Inc.*, 637 F. Supp. 151 (W.D.La. 1986) [offshore oil diver held seaman]; *Etu v. Fairleigh Dickinson Univ. of the West Indies*, 635 F. Supp. 290 (D.Vir.Is. 1986) [scientific support diver]; *Smith v. Brown & Root Marine Operators, Inc.*, 243 F. Supp. 130 (D.C.La. 1965), *aff'd*, 376 F.2d 852 (5th Cir. 1967) [offshore oil diver held seaman]; *Brown & Root v. DeSautell* (Tex.Civ. App. 1977) 554 S.W.2d 764 [offshore oil diver held seaman]; *DeGaetano v. Merritt & Chapman Derrick & Wrecking Co.* (App. Div. 1927) 219 N.Y.S.

recognized in *Wilander*, ship's pilots have been treated as seamen since the earliest days of the Republic.[23] In short, Jones Act law has taken some surprising turns of late. The instant case gives this Court an opportunity to set things straight.

By affirming the decision below, and upholding seaman's status for those whose shipboard assignments at the time of the injury expose them to the perils of the sea, this Court can bring the Jones Act back on course, save the statute from harsh and incongruous interpretations, and ballast the decisions more deeply in the "land-based/ sea-based" distinction upon which the whole remedial

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242 [salvage diver held seaman]; *Kjar v. American Divers, Inc.*, 1994 A.M.C. 522 (D.C.Ha. 1991) [scuba diver held seaman]; *Hamilton v. County of Los Angeles* (1982) 131 C.A.3d 982, 182 C.R. 868 [scuba diver held seaman]; *De Court v. Beckman Instruments, Inc.* (1973) 32 C.A.2d 628 [test diver held seaman]; *Howard v. Global Marine, Inc.* (1972) 28 C.A.3d 809 [ship survey diver held seaman]; *Smith v. Union Oil Co.* (1966) 241 C.A.2d 338 [offshore oil diver held seaman]; *see also, Kopczynski v. The JACQUELINE*, 742 F.2d 555 (9th Cir. 1984) [diver tender held seaman].

[23] As *Wilander* summed up:

> "A cook and steward are seamen in the sense of the maritime law, although they have peculiar duties as assigned them. *So a pilot*, a surgeon, a ship carpenter, and a boatswain, are deemed seamen, entitled to sue in admiralty." *Id.*, 111 S. Ct. at 811 *quoting U.S. v. Thompson*, 28 F.Cas. 102 (No. 16,492) (CCD Mass. 1832) [emphasis added]. *See also, Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 316 (1852)

Indeed, ship's pilots have been treated as seamen since the twelfth century and the Code of Oleron. *See e.g.*, Bederman, "Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts," 64 Tulane L.Rev. 1033, 1041 (1990); *Benedict on Admiralty* (7th ed. 1989), Laws of Oleron, § 27, pp. 2-6.

scheme ultimately floats. That is why the UBCJA has respectfully filed this brief.

We believe that petitioners and their *amici* are misreading *Wilander*. When it comes to describing the necessary "employment-related connection to a vessel," we respectfully submit that the Second Circuit's requirement that a plaintiff's assignment be "substantial in terms of its (a) duration *or* (b) nature," and that it "expose the plaintiff to the hazards of the sea,"[24] captures well an important requirement of seaman status.

ARGUMENT

I.

THE INQUIRY INTO SEAMEN STATUS IS FACT-SPECIFIC AND TURNS ON THE NATURE OF THE VESSEL AND THE PLAINTIFF'S PRECISE RELATIONSHIP TO IT.

We begin our analysis of the question for review by remembering that, in most cases, it's ultimate application will be a matter for the jury. Petitioner's amicus, the City of New York, urges this Court to adopt "a predictable test for seaman status" that can be resolved by "Rule 12(b) procedure as a [threshold] jurisdictional question."[25] But as *Wilander* reminds us, the issue is "better characterized

[24] *Latsis v. Chandris, Inc. (Opinion Below)*, 20 F.3d 45, 57 (2d. Cir. 1994) [emphasis added].

[25] *See* Amicus Curiae Brief of the City of New York in Support of Petitioners ("Brief of the City of New York"), p. 8.

as a mixed question of law and fact."[26] Whatever petitioner and its *amici* might hope, "The inquiry into seaman status is of necessity fact-specific; it will depend on the nature of the vessel and the employee's precise relation to it."[27] The present inquiry, of course, concerns the latter of those two factors – the employee's precise relationship to the vessel. The City of New York has nonetheless briefed us on the definition of a "vessel in navigation."[28] Since this Court's "power to decide is not limited by the precise terms of the question presented"[29], those desultory arguments[30] merit a short reply.

[26] *Wilander, supra*, 111 S. Ct. at 818.

[27] *Id.*

[28] Brief of the City of New York, pp. 21-23.

[29] *Procunier v. Navarette*, 434 U.S. 535, 559 n. 6 (1978).

[30] The UBCJA, of course, recognizes that this Court's rules are very specific, and "do not normally address any issues other than those fairly comprised within the questions presented by the petition for *certiorari* and any cross petitions." *Lake Country Estates, Inc. v. Tahoe Reg. Plan.*, 440 U.S. 391, 398 (1979). Thus, "the brief may not raise additional questions or change the substance of the questions already presented in those documents." United States Supreme Court Rule 24.1(a).

II.

THE TERM "VESSEL IN NAVIGATION" SHOULD BE INTERPRETED BROADLY, IN KEEPING WITH THE JONES ACT'S REMEDIAL PURPOSE AND LIBERAL HISTORY, AND SHOULD NOT BE CONSTRAINED BY THE PROLIX "FLOATING WORK PLATFORM DOCTRINE" OR ANY OF ITS OFFSPRING.

As used in the Jones Act, the term "vessel" has traditionally been construed very liberally.[31] According to the statutory definition, it "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[32] As this Court has specifically ruled, that definition reaches anchored special purpose vessels, such as derrick barges, dredges and paint boats, that were neither underway at the time of the accident, nor "in transit" at any point during the plaintiff's assignment.[33]

Beginning in 1984, with the Fifth Circuit's decision in *Bernard v. Binnings Const. Co.*,[34] the Gulf Coast courts have carved out a confusing and controversial exception to that broad rule known as the "floating work platform doctrine."[35] Wielding what one of the field's leading

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[31] *See e.g., Kathriner v. Unisea, Inc.*, 975 F.2d 657, 662 (9th Cir. 1992) [summarizing cases].

[32] 33 U.S.C. § 3.

[33] *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 372 (1957) [anchored dredge]; *Wilander, supra* [anchored paint boat]; *Gizoni, supra* [anchored shipyard scow].

[34] 741 F.2d 824 (5th Cir. 1984).

[35] *See also, Ducote v. V. Keeler & Co. Inc.*, 953 F.2d 1000 (5th Cir. 1992); *Ellender v. Kiva Const. & Engineering, Inc.*, 909 F.2d 803 (5th Cir. 1990); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990); *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40, 43

commentators has termed a "prolix" and "extremely flabby" test,[36] that doctrine uses three "non-requisite criteria" and nine free-floating "factors"[37] to distinguish between "actual" vessels and mere "floating work platforms."[38] Just how the Fifth and Eleventh Circuits selected these random determinants from the countless characteristics that ingenuity, technology, poetry, and history have crafted into the concept of a vessel was never explained, but Gulf Coast courts typically use them, like an auger, to scuttle Jones Act claims summarily under Rule 56. Those summary judgments have left a long slick of chaotic results,[39]

(5th Cir. 1989); *but see Sharp v. Johnson Bros. Corp.*, 917 F.2d 885 (5th Cir. 1990); *Brunet v. Boh Brothers Construction Co.*, 715 F.2d 196, 198-199 (5th Cir. 1983).

[36] *See* Robertson, "The Law of Seaman Status Clarified," 23 J. of Mar. L & Comm. 1, 14 (Jan. 1992).

[37] The three criteria inquire whether the structure at issue was: (a) constructed and used primarily as a work platform rather than for transporting people or things; (b) moored or otherwise secured at the time of the accident; and (c) capable of anything other than a "merely incidental" transportation function. The nine free floating factors ask whether the structure sports: (1) navigational aids; (2) a raked bow; (3) lifeboats and other life-saving equip ment; (4) bilge pumps; (5) crew quarters; (6) Coast Guard registration; (7) the ability to float; (8) the ability to move; and (9) a recent history of movement. *See Bernard, supra*, 741 at 831-832.

[38] *Id.*, 741 F.2d at 831.

[39] *Compare e.g., Ellender v. Kiva Construction Co., supra* [upholding summary judgment denying seaman status to piledriver assigned to crane barge anchored on Chandeleur Sound] *with Sharp v. Johnson Brothers Corp., supra* [holding that piledriver assigned to a very similar crane barge anchored on Lake Pontchartrain could take his claim to the jury].

inter-coastal conflicts,[40] and critical comments in their wake.[41] We respectfully urge this Court to consider those cases here.

We also urge the Court to consider the First Circuit's decision in *DiGiovanni v. Traylor Bros., Inc.*[42] Taking its inspiration from the "floating work platform doctrine," that case fished the "aid to navigation requirement" from among the flotsam to which the *Wilander* decision had "jettisoned" it, and ruled that workers assigned to dredges and crane barges are seamen only when they are injured while their vessel is "in transit."[43] According to *DiGiovanni*, and its progeny, as soon as a dredge or a barge (or any other special purpose vessel whose primary mission is not the transportation of people or goods) casts off her tug, drops her anchors and sets about her special mission, the "voyage ends," and the workers upon her decks turn, Cinderella-like, into LHWCA beneficiaries.[44]

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[40] In contrast to the Fifth and Eleventh Circuit's doctrinal approach, the Ninth Circuit has ruled that "[t]here is no formula by which to determine whether a structure is a vessel." *Kathriner v. Unisea, Inc., supra*, 975 F.2d at 662.

[41] Allbritton, "Seaman Status in *Wilander's* Wake," 68 Tulane L.Rev. 363 (1994); Robertson, *supra;* Arsenault, "Special Purpose Vessels Under Attack," 5 Maritime Law Rptr 24 (Spring, 1993).

[42] 959 F.2d 1119, 1123 (1st Cir. 1992), *cert. den.*, 113 S. Ct. 87 (1992).

[43] *See also, Hatch v. Durocher Dock & Dredge, Inc.*, 33 F.3d 545, 547 (6th Cir. 1994).

[44] *DiGiovanni, supra*, 959 F.2d at 1121.

Needless to say, this magical transformation was not visited upon the Act without a stinging dissent from the First Circuit's Senior Judge.[45]

Whether or not the question on appeal focuses squarely on these collateral "vessel" issues, the UBCJA respectfully requests the Supreme Court to examine *Bernard* and *DiGiovanni* in order to clarify the law. Without belaboring the point, those cases seem to be at odds not only with *Senko, Wilander*, and *Gizoni*, but with the whole history and purpose of the Jones Act, and indeed with the Fifth Circuit's own proud legacy since *Robison*. It was the Fifth Circuit, after all, that first "expanded the coverage of the Jones Act to include almost any workman sustaining almost any injury while employed on almost any structure that once floated or is capable of floating on navigable water."[46] Its decisions have since undergone a philosophical sea change. We respectfully urge the Court to take this opportunity to determine whether that chilly new climate is truly consistent with the sunny traditions of the Jones Act. That statute, after all, is a remedial legislation that must be liberally construed to extend rather than restrict its ambit.[47] We respectfully submit that the *Bernard* and *DiGiovanni* cases have lost sight of that well settled rule. The decision below did not.

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[45] *Id.*, 959 F.2d at 1124 [Toreulla, J., and Bownes, J., dissenting].

[46] *Robison, supra*, 266 F.2d at 771.

[47] *See The Arizona v. Anelech*, 298 U.S. 110, 121-122 (1936); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 375 (1932); *Warner v. Goltra*, 293 U.S. 155, 157 (1934).

III.

THE "PERMANENT" OR "SUBSTANTIAL CONNECTION" REQUIREMENT MUST BE RETOOLED IN THE WAKE OF *WILANDER* TO PROTECT ANYONE INJURED IN THE COURSE OF A VOYAGE.

As more and more authorities are taking care to point out, the old "permanent assignment" factor has been retooled by *Wilander* to comprise an "employment-related connection to a vessel in navigation."[48] Even before that decision, it had long been settled that the word " 'permanent' has never been assigned a literal interpretation under the Jones Act, and should not be given a 'wooden application,' but rather, is to be used as an analytical starting point instead of a self executing formula."[49] This seems truer still in the wake of *Wilander*.[50]

Though many lower courts remain mired in their own pre-*Wilander* interpretations,[51] a growing chorus of

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[48] *Wilander, supra*, 111 S. Ct. at 817.

[49] *Guidry v. Continental Oil Co.*, 640 F.2d 529, 523 (5th Cir. 1981).

[50] *See e.g., Bach, supra*, 947 F.2d at 1291-1293 [Brown, J., dissenting].

[51] This tendency is by no means restricted to the Fifth Circuit. In *McKinley v. Allalaskan Seafoods, Inc.*, 980 F.2d 567 (9th Cir. 1992), for example, the Ninth Circuit set out its pre-*Wilander* "three part test for determining 'seaman' status under the Jones Act" as follows:

> "(1) the vessel on which the claimant was employed must be in navigation;
>
> (2) the claimant must have a more or less permanent connection with the vessel; and,

authorities has come to realize that what we once called "the permanent connection factor is not a temporal relationship with any particular ship, but is employment-related and focuses instead on the nature of the workers' duties as they relate to the ship and the ship's mission at the time of the injury."[52] As the decision below put it, "The more or less permanent connection element of [the test for seaman status] is not merely a temporal concept."[53] Might it not, then, be time for this Court to jettison the confusing "permanency" requirement just as it jettisoned the aid to navigation requirement in *Wilander*?

1. Where, as Here, the Plaintiff Was Injured aboard a Vessel during a Voyage, Seaman Status Need Not Be Determined within the Context of His or Her Entire Employment.

Except, perhaps, for galley slaves or the Flying Dutchman, no seaman has ever been cursed with a truly permanent assignment. As a consequence, some courts have qualified that requirement with the modifier "more

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> (3) the claimant must be aboard primarily to aid in navigation." *Id.*, 980 F.2d 567.

Even though this decision was handed down more than a year after this Court's decision in *Wilander*, we have to look to a footnote to discover that "The third part of the test was rejected in *McDermott Int'l*, 498 U.S. at ___, 111 S. Ct. at 817." *Id.*, at fn. 3. Old Jones Act interpretations clearly die hard.

[52] *Evans v. United Arab Shipping Co. S.A.G., supra*, 4 F.3d at 220-221.

[53] *Decision Below*, 20 F.3d at 52-53.

or less,"[54] while others have allowed seamen to satisfy it by proving that they performed "a substantial part" of their work aboard a vessel.[55] Still others have found "no insurmountable difficulty" in the fact that the seaman performs a substantial part of his or her work aboard a fleet of different vessels.[56] As originally handed down, these modifications were crafted to "ease" the permanent assignment requirement and thus expand the protective reach of the Jones Act.[57] They were obviously intended as a shield for injured workers.[58] As a famous passage from *Robison* put it, they made "[t]he reach of the Jones Act . . . a peril of the sea that could hardly have been dreamt of by the landlubbers in the oil business."[59] But in the last few years, Gulf Coast courts have turned the

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[54] *E.g., McKinley, supra,* 980 F.2d at 569.

[55] *E.g., Robison, supra,* 266 F.2d at 779.

[56] *Braniff v. Jackson Ave. Gretna Ferry, Inc.,* 280 F.2d 523, 528 (5th Cir. 1960); *see also Barrett, supra; Buna v. Pacific Far East Lines, Inc.,* 441 F. Supp. 84, 87-89 (N.D.Ca. 1978).

[57] *Stanfield v. Shellmaker, Inc., supra,* 869 F.2d at 525.

[58] *See, Chauvin v. Sanford Offshore Salvage, Inc.,* 868 F.2d 735 (5th Cir. 1989); *New v. Associated Painting Services, Inc.,* 863 F.2d 1205 (5th Cir. 1989); *Legros v. Panther Service Group, Inc.,* 863 F.2d 345 (5th Cir. 1989); *Lormand v. Superior Oil Co.,* 845 F.2d 536 (5th Cir. 1987); *Liverette v. N.L. Sperry Sun, Inc.,* 831 F.2d 554 (5th Cir. 1987); *Barrett v. Chevron, USA, Inc., supra; White v. Valley Line Co.,* 736 F.2d 304 (5th Cir. 1984); *Jones v. Mississippi River Grain Elevator Co.,* 703 F.2d 108 (5th Cir. 1983), *cert. den.,* 464 U.S. 856 (1983); *Bertrand v. International Mooring & Marine, Inc.,* 700 F.2d 240 (5th Cir. 1983); *Guidry v. Continental Oil Co.,* 640 F.2d 523 (5th Cir. 1981), *cert den.,* 454 U.S. 818 (1981); *Longmire v. Sea Drilling Corp., supra; Higginbotham v. Mobil Oil Corp.,* 545 F.2d 422 (5th Cir. 1977) *rev'd and rem'd* 436 U.S. 618 (1978).

[59] *Robison, supra,* 266 F.2d at 771.

permanent connection requirement into a nightmare for such old shellbacks as ship's pilots[60] and deep sea divers.[61] We respectfully submit that Congress never intended such bizarre and incongruous results.

As the decision below was quick to recognize, these incongruities grew out of the Fifth Circuit's view that "the language of the *Robison* test frames the substantial connection issue primarily, if not solely, in temporal terms."[62] This view lead that Circuit to the inevitable conclusion that a seaman's status must "be addressed with reference to the nature and location of his occupation taken as a whole."[63] That, of course, is the same conclusion which animates the arguments of petitioner and its *amici*. We respectfully submit that it is erroneous for several reasons.

2. The Seaman Status of Traditional Mariners Should be Determined Solely from Their Assignment at the Moment of the Injury.

The permanent connection requirement was not designed for traditional mariners, but for "ambiguous-amphibious maritime worker[s]" whose employments are

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[60] *See e. g., Bach, supra,* 920 F.2d at 333 [Brown, J., dissenting]; *Harwood, supra,* 944 F.2d. at 1194 [Ervin, J., dissenting].

[61] *Ashley, supra.*

[62] *Decision Below,* 20 F.3d at 54.

[63] *Longmire v. Sea Drilling Corp., supra,* 610 F.2d at 1347; *see also, Barrett v. Chevron USA, Inc., supra,* 781 F.2d at 1075; *Lormand v. Superior Oil Co., supra,* 845 F.2d at 540.

only incidentally related to a vessel.[64] The cases are populated, almost entirely, by oil rig welders,[65] tool pushers,[66] drilling foremen,[67] derrick operators,[68] riggers,[69] sandblasters,[70] mechanics,[71] and even granary workers.[72] But that requirement was not designed to illuminate the status of someone, like Antonio Latsis, who performs traditional seaman's work on one or more short voyages.[73] Nor should it be applied to ship's pilots or deep sea divers.

As Judge Brown dissented in *Bach*:

> "A compulsory pilot is in no sense comparable to those incidentally related to a vessel. Such pilot is indispensable. The vessel may not operate without him/her. That pilot is in supreme command of the basic function of the vessel – to navigate in maritime commerce. That person is a seaman or he/she is nothing."[74]

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[64] *Braniff v. Jackson Avenue Gretna Ferry, Inc., supra*, 280 F.2d at 525.

[65] *Barrett, supra; Lormand, supra.*

[66] *Guidry v. Continental Oil Co., supra.*

[67] *Higginbotham v. Mobil Oil Corp., supra.*

[68] *Liverette v. N.L. Sperry Sun, Inc., supra.*

[69] *Chauvin v. Sanford Offshore Salvage, Inc., supra.*

[70] *New v. Associated Painting Services, Inc., supra.*

[71] *Braniff, supra.*

[72] *Jones v. Mississippi River Grain Elevator Co., supra.*

[73] *Barrett v. Chevron USA, Inc., supra*, 781 F.2d at 1075, fn. 13.

[74] *Bach, supra*, 920 F.2d at 333 [Brown, J., dissenting]. To quote Chief Judge Ervin's dissent in *Harwood*:

> "In order to carry out his duties, the harbor pilot must board a ship he does not know and work with equipment he has not had a chance to examine. If the shipowner has the duty to provide a seaworthy vessel and equipment to the members of the crew, who have been excluded from the [Longshore] Act so that they may retain the benefit of that warranty as well as other general maritime remedies, surely the harbor pilot performing navigational duties aboard the ship with that same equipment is owed that same duty." *Harwood, supra*, 944 F.2d. at 1194 [Ervin, J., dissenting].

And as the Fifth Circuit, itself, admonished in *Wallace v. Oceaneering Int'l*:

> "We hold that a commercial diver, who embodies the traditional and inevitable task of navigation, has the legal protections of a seaman when a substantial part of his duties are performed on vessels. It is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure on the vessel from which he makes the particular dive on which he was injured, that makes [a diver] a seaman."[75]

What is more, even when applied to "ambiguous-amphibious maritime workers," like the "landlubbers" in

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[75] 727 F.2d. at 436. As Judge Fong recently put it in a decision from the district court of Hawaii: "The Fleet Seaman Doctrine was designed by the Fifth Circuit to broaden coverage under the Jones Act; its purpose is to extend 'seaman' status to those performing many land-based duties. Divers are inherently maritime workers – their primary functions are performed under the sea. They are not the intended beneficiaries of the Fleet Seaman Doctrine and to hold them to the overall-context-of-employment standard would defeat the doctrine's expansive purpose. Therefore, the court finds that the applicable time period for 'seaman' status is the time of the accident." *Kjar v. American Divers, Inc., supra*, 1994 A.M.C. at 529.

the offshore oil business, the substantial connection requirement has not one, but two distinct purposes. As the decision below explained, it was intended: First, to exclude those whose work brings them into contact with many vessels but who are not connected with any particular vessel or identifiable fleet of vessels; and, Second, to exclude those whose contribution, although limited to a single vessel or fleet of vessels, was nevertheless only temporary or transitory in nature.[76] As alert commentators were quick to realize, this double-barrelled approach scattered a good deal of confusion among the cases.[77] But if we rephrase the test in terms of the monolithic "sea-based/land-based" distinction that this Court emphasized in *Wilander*, as the Louisiana Supreme Court did in *Folse v. W. Atlas Int'l, Inc.*,[78] we see that the substantial connection requirement merely differentiates "between transitory land-based employees and those working aboard a vessel for a voyage."[79] To make the point again is to belabor it. The former must look to the LHWCA, no matter how much time they may spend afloat, while the latter are protected by the Jones Act, no matter how short their voyage may have been. This was the simple synthesis worked by the decision below.

Quoth the Second Circuit:

> "We reiterate that after *Wilander* and *Gizoni* the test of seaman status under the Jones Act is an

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[76] *Decision Below*, 20 F.3d. at 56.

[77] Robertson, "The Law of Seaman Status Clarified," *supra*, 23 J. of Mar.L. & Com. at 16-27.

[78] 593 So.2d 341 (La. 1992).

[79] *Id.*, 593 So.2d at 343.

> employment-related connection to a vessel in navigation. The test will be met where a jury finds (1) that the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration *or* (b) nature; (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea."[80]

As *Robison* did before it, this alternatively worded test "captures well an important requirement of seaman status."[81] It eschews the prolix and confusing "work platform doctrine," preserves the purely temporal criteria that are still necessary to identify "commuter" or "brown water seamen" like derrick barge hands,[82] tugboatmen,[83] ferry boat operators,[84] or dredge engineers,[85] and at the same time vouchsafes coverage to all those traditional "blue water" mariners, like ship's pilots[86] and deep sea divers,[87] whose individual voyages may be very short.

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[80] 20 F.3d at 57 [emphasis added].

[81] *Wilander, supra*, 111 S. Ct. at 817.

[82] *See e.g., Grimes v. Raymond Concrete Pile Co., supra* [piledriver held seaman]; *Soucie v. Trautwein Bros.* (1969) 275 C.A.2d 20 [piledriver held seaman].

[83] *Kernan v. American Dredging Co.*, 355 U.S. 426, 435, 78 S. Ct. 394, 399 (1958) [tugboat deckhand].

[84] *Braniff, supra* [ferry boat hand].

[85] *Senko, supra* [dredge engineer]; *Ramos v. Universal Dredging Corp.*, 547 F. Supp. 661 (D.C.Ha. 1982) [dredge engineer].

[86] *See* footnote 19, *supra*.

[87] *See* footnote 22, *supra*.

What is more, it makes the policy considerations outlined in *Wilander* quite explicit by working an on-going exposure to maritime hazards into the test. That test requires an employment-related allegiance to a rolling, pitching vessel,[88] and protects all those who *voyage* upon the waters. This brings us to our final point.

IV.

SEAMAN'S STATUS SHOULD NOT BE LIMITED TO THOSE WHO VOYAGE ON THE OPEN OCEAN.

While the Jones Act was plainly intended to protect offshore workers from the "perils of the sea,"[89] we should not interpret it to exclude the seamen who voyage on our Great Lakes, great and small rivers, scenic sounds, and salt water bays. Indeed, seamen can even be found on fresh water creeks.

Ninety-eight years ago, the Fourth Circuit sat down to the riddle of seaman standing in the aptly named *Saylor v. Taylor*.[90] The Jones Act would not be passed for another twenty-four years, but the court had to decide whether to grant a maritime wage lien to a crew of fresh water dredge hands. The resulting opinion is worth quoting at length:

> "And so it seems a stretch of the imagination to class the deck hands of a mud dredge in the

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[88] *Wilander, supra*, 498 U.S. at 346-347.

[89] *Wilander, supra*, 111 S. Ct. 807, 817 (1991); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 879-880 (1946); *Gizoni, supra*, 112 S. Ct. at 493.

[90] 77 F. 476 (4th Cir. 1896).

> quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far-reaching are the principles which underlie the jurisdiction of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world. Hence it is that in all times and in all countries those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, 'no matter what may be their sex, character, station or profession.' "[91]

That ruling adumbrated *Robison* by more than 60 years. It foreshadowed *Wilander* by almost a century. But it still illuminates the Jones Act today. If that statute is to continue to adapt itself to all the new kinds of property and new sets of operatives and new conditions that are brought into existence in the progress of the world, we would do well to heed *Saylor's* holding in this case.

CONCLUSION

When the Jones Act was first adopted in 1920,[92] steam still competed with sail on most of the world's

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[91] *Id.*, 77 F. at 479.

[92] March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; amended June 5, 1920, c. 250, Sec. 23, 41 Stat. 1007.

trade routes, and the American merchant marine still flew its flag on all the world's oceans. Our seamen still navigated by the stars, steered by hand, and slept before the mast. Deep sea divers still braved the depths in heavy brass helmets, and still decompressed on open platforms in cold, black waters. In the last 74 years, merchant sail has disappeared. Diesel has supplanted steam. The American merchant marine has ebbed from the routes it used to dominate, and its few remaining mariners have learned to plot their course with computers, steer by auto-pilot, and live in air-conditioned crew's quarters among pools, spas, and video games.[93] But deep sea divers like those who belong to the UBCJA still brave the depths in the same brass helmets. They still decompress in the same cold waters on the same open platforms. Their job has changed very little. It still requires a degree of courage, strength, confidence, and endurance that is seldom called for ashore. In many ways, divers are the last real seamen. Certainly, no man is more exposed to the sea or to its perils, and none is more deserving of the protection we seek here. We respectfully urge this Court

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[93] A quarter-century ago, the American merchant marine still boasted 45,650 shipboard positions. U.S. Dept. of Transportation, Maritime Adm., *The Annual Report of the Maritime Administration for Fiscal Year 1986 ("MARAD Annual Report")*, Gov't Printing Off. (Wash.D.C. 1963), 19. By 1981, that number had dwindled to 46,245. *MARAD Annual Report* (1981 ed.) 44-45. According to the most recent figures, there are only 17,887 card-carrying merchant seamen left. *MARAD Annual Report* (1985 ed.) 37. The future of the Jones Act plainly lies elsewhere.

to vouchsafe that protection by affirming the decision below.

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